

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:RFP:[REDACTED]:GL-119726-01
[REDACTED]

date: JAN 16 2002

to: LMSB Group [REDACTED], [REDACTED]
Attn: Team Manager [REDACTED]

from: Associate Area Counsel (LMSB) Area [REDACTED]

subject: [REDACTED]
[REDACTED]

Advisory Opinion - FOIA Request; Document Copying

This memorandum follows discussions between this office and the Examination Team which is currently examining federal income tax returns filed by the above-referenced taxpayer. This also supercedes our memorandum on this subject dated September 21, 2001. During those discussions, we were advised by the Team that, at the conclusion of each examination cycle, the taxpayer files a request asking that the Service provide to the taxpayer a copy of the entire administrative file under the Freedom of Information Act (5 U.S.C. § 552). The Team, along with the Disclosure Officer in [REDACTED], has determined that no exceptions to disclosure apply to the vast majority of this information and thus, past practice has been for the Service to spend immense time and energy (at government expense) making copies to be provided to the taxpayer. Following our last discussion on this subject, this office indicated that we would try to provide to the Examination Team some relief from the situation outlined generally below.

We have coordinated our response with the office of the Assistant Chief Counsel (Disclosure & Privacy Law).

ISSUE

Whether, under the circumstances of this case, the Internal Revenue Service must bear the cost of researching and copying documents to be provided to the taxpayer in accordance with the taxpayer's request for information under the Freedom of Information Act at the conclusion of each examination cycle?

CONCLUSION

While the taxpayer is generally entitled to copies of various documents under the Freedom of Information Act, we believe that the Service should recoup the costs thereof directly from the taxpayer. In our opinion, the Service can and should demand monetary reimbursement from the taxpayer in accordance with 5 U.S.C. § 552(a)(3) for costs associated with this endeavor. We suggest that you seek further assistance on this matter from the Disclosure Office of the Internal Revenue Service. We also note that certain documents which the taxpayer may request may be exempt from disclosure under FOIA. We will be happy to provide advice and assistance with respect to any such applicable exemptions if and when the taxpayer files a FOIA request with respect to the current cycle. We can also at that time provide advice regarding the statutory FOIA time frame in which the Service must respond to a request and extensions thereto which may be applicable under the circumstances of this case.

FACTS

An Examination Team has been examining the above-referenced taxpayer's federal income tax returns for several consecutive examination cycles. Historically, at the end of each cycle, the taxpayer has submitted a request for information under the Freedom of Information Act (5 U.S.C. § 552), seeking in essence a copy of the entire administrative file. The breadth and width of the taxpayer's returns and of the resultant examinations are voluminous. Therefore, compliance with the taxpayer's FOIA request requires significant time and effort at the end of each cycle. In fact, we understand that in order to adequately respond to the FOIA request at the end of each cycle, several team members (revenue agents) spend several months each researching, compiling, editing and copying the documents to be turned over to the taxpayer in response to the FOIA request.

The examinations of this taxpayer are conducted "on-site"; i.e. the Team is assigned space at a building owned by the taxpayer which is located on the grounds of the taxpayer's [REDACTED] headquarters. The administrative file and all accompanying documents are assembled and kept at this on-site office. Accordingly, all research, editing and copying in response to the FOIA request is performed by the team members at this facility. Since the taxpayer has provided a copy machine (i.e., a "xerox" machine) at the facility, all of the copying necessary to respond to the FOIA requests is performed on the

taxpayer's machine, using the taxpayer's electricity and other "overhead" expenses (i.e., lighting, heating, cooling, etc.). We understand that, in addition to supplying the personnel to research, edit and copy, the Service also provides the paper on which the documents are copied.

Apparently due to the fact that the taxpayer supplies the office space at which and the copying machine on which the documents are copied in response to the FOIA request, the Service has historically absorbed the entire burden of the cost of researching and copying the documents to be turned over. In other words, the Service has not charged the taxpayer in any way for the considerable effort expended in complying with the FOIA requests at the completion of each examination cycle.

During a visit to the examination site, members of this office engaged in a discussion with the examination team regarding the onerous burden placed on the team by the taxpayer's FOIA request at the end of each cycle. This office represented that we would look into this matter and try to provide thoughts with respect to any relief which might be appropriate.

DISCUSSION

Overview

The Freedom of Information Act (hereinafter sometimes referred to as "the Act"), codified at 5 U.S.C. § 552, provides access to certain records within the possession of administrative agencies of the executive branch of the federal government.¹ That statute provides, in part, that unless a statutory exception applies, **all** records within the possession and control of these entities must be released upon request unless the information falls within one of the Act's nine specific exemptions. See, United States Department of Justice v. Tax Analysts, 492 U.S. 136 (1989). The requester under FOIA need not show any reason that it seeks or needs the information sought; the burden of proof for

¹In addition to that portion of the Act which is discussed herein (i.e., documents requested under FOIA), the Act further provides that certain information must be published by the government in the Federal Register (5 U.S.C. § 552(a)(1)) and that certain information must be made available for public inspection and copying unless promptly published and offered for sale (5 U.S.C. § 552(a)(2)). Due to the nature of the issue involved in this case, these aspects of FOIA will not be discussed in this memorandum.

withholding information is placed squarely on the government.

Statutory Exemptions

The Act provides certain statutory exemptions from disclosure. Whether any such exemptions may apply to certain information which the taxpayers may seek at the conclusion of the current cycle is well beyond the scope of this memorandum, though we will be happy to assist the Team in determining whether any information which the taxpayer may seek should be excluded from the materials which may ultimately be provided pursuant to the anticipated FOIA request for the current cycle. The following brief discussion of the statutory exemptions is meant simply as an overview so that the Team may have a general understanding of the statutory scheme.

Statutory exemptions which **may** apply to certain documents requested by the taxpayer following the close of the current examination cycle include the following:

1. Matters related solely to the internal personnel rules and practices of an agency, 5 U.S.C. § 552(b)(2);
2. Information specifically exempted from disclosure by statute (other than the FOIA statute), provided that such statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or establishes particular criteria for withholding or refers to particular types of matters to be withheld², 5 U.S.C. § 552(b)(3);
3. Trade secrets and commercial or financial information obtained from a person and privileged or confidential, 5 U.S.C. § 552(b)(4);
4. Inter-agency or intra-agency memorandums or letters which would not be available by law to a party....in litigation with the agency³, 5 U.S.C. § 552(b)(5); and
5. Records or information compiled for law enforcement purposes, though this exemption is limited to **very** narrow

² I.R.C. § 6103 which controls generally the disclosure of tax returns and tax return information by employees of the Internal Revenue Service, is such a statute.

³ This exemption includes matters which are subject to the governmental privilege, attorney-client privilege, and the attorney work product doctrine.

circumstances, 5 U.S.C. § 552(b)(7).

The discussions between the examination team and this office did not include discussions regarding specific information to which any of these (or other) statutory exemptions may apply. In fact, we understand that the Examination Team has worked closely with the Disclosure Officer in past cycles to determine what information was exempted and that the Team is comfortable with the fact that all documentation which has been turned over for past cycles was done so properly. We will be happy to provide any assistance as needed in determining whether any information regarding the current cycle is exempt from release to the taxpayer in response to the anticipated forthcoming FOIA request. Please contact the undersigned when and if you desire any such assistance. We will also be happy to assist in coordinating the Examination Team's contacts with the Disclosure Officer if the Team so desires.

Fees for Services Rendered

The Act provides that each agency (including the Internal Revenue Service) will make all agency records (other than those records which fall under a specific FOIA exemption) available upon any request which reasonably describes such records and is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed. 5 U.S.C. § 552(a)(3). The Act also directs each agency to promulgate regulations specifying the schedule of fees applicable to the processing of requests under the Act and establishing procedures and guidelines for determining when such fees should be waived or reduced. The Act also provides, inter alia, that those agency regulations must provide that, when documents regarding an examination of its own returns is requested by a taxpayer (such as in the instant case), fees should be limited to **"reasonable standard charges for document search and duplication"**. 5 U.S.C. § 552(a)(4)(A)(ii)(III).

The Internal Revenue Service has promulgated regulations regarding fees to be charged for records requested under FOIA in 26 C.F.R. 601.702(f). Subsection (3)(E) of that regulation provides that the a requester such as the taxpayer in the instant case is considered to be an "other requester" for purposes of that regulation. Any such other requester "shall be charged fees that will cover the **full direct cost of searching for and duplicating records**, except that the first two hours of search time and first 100 pages of duplication shall be furnished without charge." 26 C.F.R. 601.702(f)(ii)(E).

Under the Treasury Regulations (specifically, 52 Fed. Reg. 10018 § 1.7(a)(4)), which regulations apply to the Internal Revenue Service, requesters are generally not charged "search fees" for requests for records on themselves. We also note that "search fees" would probably not be appropriate under these circumstances since the documents are all together in one place at the close of the examination cycle.⁴ Thus, we must examine whether it is appropriate to charge the requestor the "full direct cost" of duplicating the documents. Based on the information supplied by the Examination Team, this is the task which takes virtually all of the members' time in responding to the FOIA requests.

The fees for services performed by the Internal Revenue Service shall be imposed for searches other than searches of computerized records at \$17.00 per hour or fraction thereof for time spent by each clerical, professional, and supervisor in finding the records and information within the scope of the request. 26 C.F.R. 601.702(f)(5)(i)(A). For computerized records, the fee is the actual direct cost of the search. 26 C.F.R. 601.702(f)(5)(i)(B). Fees charged for duplication, other than for returns or related documents, are twenty cents per copy of each page, up to 8½" X 14", made by photocopy or similar process. 31 C.F.R. § 1.7(g)(1)(i).⁵ When copies of returns are provided incidental to releasing an administrative file, the \$.20/page copying fee, in lieu of the separate fees for duplicating returns, is applicable. IRM 1.3.5.9.2(3). Requesters are to be charged the actual cost of duplicating photographs, films, and other materials. 31 C.F.R. § 1.7(g)(1)(ii). Requesters are to be charged the actual cost involved in performing other types of duplication services, such as reproducing CD-ROMs, audiotapes, or videotapes. 31 C.F.R. § 1.7(g)(1)(iii). Agencies are also permitted to contract out reproduction services, charging the requester the actual cost

⁴ Certain other types of requesters, such as requesters who intend to use the information secured for commercial use, may be charged not only for costs of search and duplication, but also for the costs of "review". "Review" in this context includes doing all that is necessary to excise and otherwise prepare records for release. "Other requesters", such as the taxpayer in the instant case, are not subject to charge for these costs of review.

⁵ Treasury's regulations raised the duplication fee from the \$.15/page reflected in the IRS regulations to \$.20/page. The IRS is presently revising its regulations to reflect changes contained in the Treasury regulations.

charged by the private contractor. 31 C.F.R. §1.7(g)(1)(iv). So, to the extent the Examination Team determines that the entire administrative file may be provided to the requester, the IRS does have the option of entering into a contract for reproduction services, to be incurred by the requester. Should you wish to consider this option, you should coordinate with the Disclosure Officer.

As noted above, the Service has not historically charged this taxpayer the "per page" duplication fee provided by the regulations since the copies are made on the taxpayer's copier in the taxpayer's building. However, the regulation in no way precludes the assessment of the "per page" duplication fee. We draw authority for our conclusion that it is appropriate to charge the taxpayer the "per page" duplication fee from IRM 1.3.5.7.2(4). It provides that "the fee for copies is the same regardless of whether copies are produced in response to the request at hand or are drawn from existing stocks including, at the convenience of the Service, original materials or surplus printed materials." Accordingly, if the same "per page" fee may be charged simply to provide already existing copies, then the "per page" fee may be charged when the Examination Team expends its resources to make copies, albeit on the taxpayer's premises, using the taxpayer's equipment.

We suggest that the Examination Team contact the Disclosure Office in an effort to determine the appropriate charges under the regulations if and when this taxpayer makes another FOIA request for the entire file at the conclusion of the current examination cycle. Given the expected volume of the material, the FOIA authorizes the Service to collect fees in excess of \$250 in advance of performing the duplication services and to offer the requester the opportunity to reformulate (and narrow) the request to minimize fees. We will be happy to assist these discussions in any way we can. Please feel free to contact the undersigned to coordinate this matter.

While our above suggestion will not save the Examination Team the time and energy which is necessary to satisfy the responsibilities of the Service under the Act, it will place the burden of cost directly on the taxpayer as is contemplated by the Act and the regulations promulgated thereunder. This may cause the taxpayer to be more selective in the records it seeks or, if not, will at least reimburse the government for the time spent in copying and providing these materials to the taxpayer.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney-client privilege. If disclosure becomes necessary, please contact this office for our views.

Please contact the undersigned at ([REDACTED]) [REDACTED] if you wish to discuss this matter further or if you would like to discuss other suggestions and/or ideas regarding this issue. We strongly suggest that the Team contact this office and the Disclosure Officer regarding this matter and our views thereon prior to notifying the taxpayer that the Service has refined it's position regarding fees for materials requested in accordance with FOIA.

[REDACTED]
ASSOCIATE AREA COUNSEL (LMSB)
AREA [REDACTED]

[REDACTED]
By: _____
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